



Billing Code: 7565-01-P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 537

Management Contracts – Background Investigations

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission (NIGC or Commission) is amending its regulation to allow reduced scope background investigations for specific types of entities with a financial interest in, or having management responsibility for, a management contract, and to update the forms of payment that may be accepted by the NIGC for background investigation fees.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

I. Background

The Indian Gaming Regulatory Act (IGRA) requires that each person with a financial interest in, or management responsibility for, a management contract for class II gaming, and in the case of a corporation, the individual members of the corporation's board of directors and stockholders who hold 10% or more of the issued

and outstanding stock, submit background information to the Chair. 25 U.S.C. 2711(a)(1). IGRA also requires that the Chair not approve any management contract if he or she determines that any person with a financial interest in, or management responsibility for, a management contract for class II gaming, and in the case of a corporation, the individual members of the corporation's board of directors and stockholders who hold 10% or more of the issued and outstanding stock is "a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto." 25 U.S.C. 2711(e)(1)(D). Pursuant to the Commission's authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [IGRA]," 25 U.S.C. 2706(a)(10), the Commission adopted a regulation, Part 537, requiring certain persons and entities undergo a background investigation, including entities with a financial interest in a management contract. 25 CFR 537.1(a)(4). The Commission is amending § 537.1(a)(4) to expand the types of entities with a financial interest in a management contract that may, at the discretion of the Chair, undergo a streamlined review, in the form of a reduced scope background investigation.

In addition, it came to the attention of the Commission that it could no longer accept certain methods of payment, specifically the posting of a bond or letter of credit for background investigation fees pursuant to § 537.3(b),(c) and (d). Thus, the

Commission is amending § 537.3(b),(c) and (d) to remove the following words:

“bond, letter of credit, or.”

II. Previous Rulemaking Activity

On November 18, 2010, the National Indian Gaming Commission (NIGC) issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment. 75 FR 70680 (Nov. 18, 2010). After consulting with tribes, NIGC published a Notice of Regulatory Review Schedule (NRR) setting out a consultation schedule and process for review. 76 FR 18457 (Oct. 12, 2011). The Commission’s regulatory review process established a tribal consultation schedule with a description of the regulation groups to be covered at each consultation. Part 537 was included in this regulatory review.

The Commission conducted tribal consultations as part of its review of Part 537. Tribal consultations were held in every region of the country and were attended by numerous Tribes and Tribal leaders or their representatives. Comments received from the NRR and tribal consultations included a recommendation for the Commission to consider amending the regulations to provide a more streamlined or expedited background investigation for tribes, tribal entities, and certain other entities already required be licensed pursuant to a tribal-state compact or are otherwise required to undergo a background investigation as a federally regulated entity.

Additionally, during the review of Part 537 the Department of the Interior brought to the attention of the Commission that it could no longer accept certain methods of

payment, specifically the posting of a bond or letter of credit for background investigation fees pursuant to § 537.3(b),(c) and (d).

After considering the comments received from the public and through Tribal consultations, the Commission decided to amend Part 537. On June 28, 2011, the Commission requested public comment on a Preliminary Draft of amendments to Part 537.

On December 27, 2011, the Commission published a Notice of Proposed Rulemaking based on the comments received during the Tribal consultations and comments on the Preliminary Draft of Part 537. The Notice of Proposed Rulemaking proposed an expanded list of entities eligible for a reduced scope background investigation at the discretion of the Chair and removed the posting of a bond or letter of credit as an available form of payment for background investigation fees. Following the publication of the proposed rule, an additional 4 Tribal consultations were held. Comments to the proposed rule were due February 21, 2012.

III. Review of Public Comments

In response to our Notice of Proposed Rulemaking, published December 22, 2011, 76 FR 79565, we received the following comments.

Section 537.1(a)(4) Applications for approval.

Comment: Several commenters suggested that the Commission remove or define the terms “institutional investor” and “federally regulated” to clarify what entities or institutions would be eligible for a reduced scope background investigation.

Response: The Commission disagrees with the commenters and believes that the terms “institutional investor” and “federally regulated” should remain in the

regulation as they provide guidance as to the types of entities meant to be included therein. Also, the Commission believes that any necessary clarification of the terms “institutional investor” or “federally regulated” can be accomplished through guidance in the form of a bulletin rather than through formal regulation.

Comment: Two commenters suggested that the proposed regulation be changed to create a rebuttable presumption that “a tribe, a wholly owned tribal entity, national bank or institutional investor that is federally regulated or is required to undergo a background investigation and licensure by a state or tribe pursuant to a tribal-state compact” qualifies for a reduced scope background investigation.

Response: The Commission believes the commenters’ suggestion goes beyond the scope of the NOI and NRR and no answer is required. However, the Commission believes that such a presumption, even if rebuttable by the Chair, would be impermissible because it would be contrary to the express statutory language that requires the Chair obtain background information from a person or an entity with a financial interest in, or management responsibility for, a management contract, and use that information to determine if a management contract can be approved. *See* 25 U.S.C. 2711(a)(1)(A) and (e).

Section 537.3 Fees for background investigations.

Comment: Several commenters suggested changing § 537.3(d) to state at the beginning that “any remaining balance of the deposit will be returned to the management contractor . . .” in order to clarify what specific portion of the deposit, if any, is to be returned to the management contractor.

Response: The Commission agrees with the comment and has added the following to the beginning of § 537.3(d): “[a]ny remaining balance of.”

IV. Regulatory Matters

Regulatory Flexibility Act

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions. Nor will the rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

This rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 2501, et seq., and is therefore not subject to review by the Office of Management and Budget.

List of Subjects in 25 CFR Part 537

Gambling, Indians—tribal government, Indians—business and finance.

For the reasons discussed in the Preamble, the Commission amends 25 CFR Part 537 as follows:

PART 537 – BACKGROUND INVESTIGATIONS FOR PERSONS OR ENTITIES WITH A FINANCIAL INTEREST IN, OR HAVING MANAGEMENT RESPONSIBILITY FOR, A MANAGEMENT CONTRACT.

1. The authority citation for Part 537 continues to read as follows:

Authority: 25 U.S.C. 81, 2706(b)(10), 2710(d)(9), 2711.

2. Amend § 537.1 by revising paragraph (a)(4) to read as follows:

§ 537.1 Applications for approval.

(a) * * *

(4) Any entity with a financial interest in a management contract (in the case of any tribe, a wholly owned tribal entity, national bank, or institutional investor that is federally regulated or is required to undergo a background investigation and licensure by a state or tribe pursuant to a tribal-state compact, the Chair may exercise discretion and reduce the scope of the information to be furnished and the background investigation to be conducted); and

* * * * *

3. Revise paragraphs (b) introductory text, (c) introductory text, and (d) of § 537.3 to read as follows:

§537.3 Fees for background investigations.

* * * * *

(b) The management contractor shall post a deposit with the Commission to cover the cost of the background investigations as follows:

* * * * *

(c) The management contractor shall be billed for the costs of the investigation as it proceeds; the investigation shall be suspended if the unpaid costs exceed the amount of the deposit available.

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(d) Any remaining balance of the deposit will be returned to the management contractor when all bills have been paid and the investigations have been completed or terminated.

4. Section 537.4 is revised to read as follows:

§537.4 Determinations.

The Chair shall determine whether the results of a background investigation preclude the Chair from approving a management contract because of the individual disqualifying factors contained in §533.6(b)(1) of this chapter. The Chair shall promptly notify the tribe and management contractor if any findings preclude the Chair from approving a management contract or a change in financial interest.

DATED: July 31, 2012, Washington, DC.

Tracie L. Stevens,
Chairwoman

Steffani A. Cochran,
Vice-Chairwoman

Daniel J. Little,
Associate Commissioner

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